gone a step further. In *Patrick v. Tetzlaff*[7] the shop cards of mechanics in a garage were permitted to serve as prima facie proof of labor performed on an automobile. The workman would jot down the time put in on each job, initial the cards and turn them into the bookkeeper at the end of the day. The latter then made up the total charges from them. At the trial, the bookkeeper identified the signature of the workmen, but no person testified that the contents of the cards were correct. Again there was no reference to any previous cases.

The just inroad which a showing of unavailability or inconvenience has made upon the general rule ought not to be extended any further. An excessive latitude would encourage fraudulent bookkeeping and loose practice. There should be required either some guarantee of reliability, or proof on the part of the litigant attempting to introduce the books that no one possessing the requisite qualifications to lay the foundation is available.[8] Montgomery Company v. Ocean Park Company[9] is justified because it meets the first test. The general manager swore the entries were correct and he was shown to have an intimate knowledge of the details of the business. But the case under review apparently fails to meet either one. At any rate, in view of the evident conflict of authority in California, it is submitted that the decision cannot be accepted as conclusive. The issue is a very practical one and an opinion from the Supreme Court, definitely settling the question for this state, is looked forward to with interest.

E. S.

FIXTURES: PRIORITY BETWEEN REAL ESTATE MORTGAGEE AND CONDITIONAL SELLER OF CHATTELS—A corporation sold certain boilers and machinery, reserving title under an ordinary conditional sale agreement until the purchase price should be paid. The buyer subsequently attached the property to the land so that it became a fixture as defined in the Civil Code,[1] and later executed a trust deed on his land to the plaintiff, who had no notice of the reserved title. In *Oakland Bank of Savings v. California Pressed Brick Company*,[2] it was held that the title of the defendant was subject to the plaintiff's trust deed.

While the exact question had never before been presented in this state,[3] the decisions in other jurisdictions are legion, the prin-

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[7] (Feb. 20, 1920) 31 Cal. App. Dec. 559, 189 Pac. 115.

[8] See Preston v. Dunn (1917) 33 Cal. App. 747, 166 Pac. 603.

[9] Supra, n. 6.

[1] Cal. Civ. Code, §§ 658-660. In this case, there was no doubt that the property involved became a fixture, in both the popular and legal sense of the term. In determining what is a fixture the courts have shown a tendency to depart from grammatical controversy over the word "annexation," and pay more regard to the intent of the parties, the nature of the thing, and the custom of the locality. See an interesting note on this subject in 18 Michigan Law Review, 405.

[2] (July 9, 1920) 60 Cal. Dec. 51.

cipal case undoubtedly expressing the weight of authority, both American[4] and English.[5] The court reasoned that a seller of personal property of this kind is not in the same position as a seller of ordinary chattels, in that he places the property in the possession and control of the buyer with knowledge that it will be affixed to the land. It is reasonable to assume, the decision holds, that he thereby agrees that the personal property should be converted into real property, and that by this transformation it will be brought under the operation of laws for the recording of contracts affecting realty, and for the protection of innocent purchasers thereof. Certainly, it seems proper that a person who lends money on the security of the land without actual or constructive notice of any outstanding title should be protected.

The case reversed a decision in the District Court of Appeal[6] in favor of the conditional seller, which held that the fact that the

[3] In the earlier California cases which had some bearing on the subject, none touched the precise issue in the principal case: In Tibbetts v. Moore (1863) 23 Cal. 208, the real mortgage was executed prior to the annexation of the chattels; cf. n. 4, infra; in Jordan v. Myers (1899) 126 Cal. 565, 58 Pac. 1061, a claimant of a mechanic's lien upon the realty to which the chattels had been annexed was not allowed to prevail against a conditional seller of the goods, but here the court expressly excepted bona fide purchasers or mortgagees of the land without notice; Hendy v. Dinkerhoff (1880) 57 Cal. 3, 48 Am. Rep. 107, merely decided that as between the parties and those with notice, it was competent for them to treat chattels as personalty after their annexation to the soil. The rule of the principal case and Elliott v. Hudson, infra, protecting a mortgagee of the land without notice against a prior chattel mortgage or conditional sale of the property which has been made a fixture, has no application to crops growing on the land. Since a mortgage on the land and the rents, issues and profits thereof will not prevail against a later chattel mortgage of the crops unless executed also as a chattel mortgage, *a fortiori*, a prior recorded chattel mortgage of growing crops should prevail against a later mortgage of the realty. See Simpson v. Ferguson (1896) 112 Cal. 180, 40 Pac. 104, 44 Pac. 484, 53 Am. St. Rep. 201; and Cowdery v. London etc. Bank (1903) 139 Cal. 298, 308, 73 Pac. 196, 96 Am. St. Rep. 115.

[4] 11 R. C. L. 1065; 1 Tiffany, Real Property (2d ed.) § 271; 1 Washburn on Real Property (6th ed.) § 9; 4 Ann. Cas. 1073, note; 49 L. R. A. (N. S.) 396, note; 84 Am. St. Rep. 877, 892, note; and see, besides the many cases there cited: Patton v. Phoenix Brick Co. (1912) 176 Mo. App. 8, 150 S. W. 1116; Great Western Manufacturing Co. v. Bathgate (1905) 15 Okla. 87, 79 Pac. 903; In re A. E. Savage Baking Co. (1919) 259 Fed. 976; Union Bank and Trust Co. v. Fred W. Wolfe Co. (1905) 114 Tenn. 255, 86 S. W. 310, 108 Am. St. Rep. 903. Contra: W. T. Adams Machine Co. v. Interstate Bldg. and Loan Assn. (1898) 119 Ala. 97, 24 So. 857. It should be noted that a different question is involved where the real mortgage was executed prior to the annexation of the chattels to the land, for in that case the mortgagee does not rely on the fixtures as part of the security. In such a case, the conditional seller usually prevails, although in some jurisdictions the mortgagee, even in this situation, is given priority where the fixtures cannot be removed without doing substantial damage to the property. See notes in 32 Harvard Law Review, 732, and 52 Central Law Journal, 480.

[5] Hobson v. Gorringe [1897] 1 Ch. 182, 75 L. T. N. S. 610, 12 Eng. Rul. Cas. 208, and see note in 1 Brit. Rul. Cas. 686, to Reynolds v. Ashby & Son [1904] A. C. 466.

[6] (July 3, 1919) 29 Cal. App. Dec. 132.

chattels were annexed to the soil did not operate to change the general rule of conditional sales protecting the seller against a subsequent sale or encumbrance by the buyer of the chattels as such.[7] The decision of the District Court of Appeal distinguished Elliott v. Hudson,[8] where a subsequent mortgagee was given priority over a chattel mortgagee of the chattels who became such prior to the annexation to the soil. The District Court of Appeal in making the distinction suggested that "the position of the vendor of personal property retaining title thereto as security for the payment of the purchase price is not directly analogous to that of a mortgagee of the chattels whose rights have been created by their owner."[9] This seems a distinction without a difference. The mere retention of the title by the person who annexed the fixtures should not affect the principle which protects a subsequent mortgagee of the realty in good faith.

A rather misleading statement appears in the decision of the District Court of Appeal, that the contract in question "was recorded in the office of the county recorder in the book devoted to miscellaneous instruments." Although the recording of a chattel mortgage has been held not to be constructive notice to the mortgagee of the realty upon which the annexation took place,[10] on the grounds that a purchaser of the realty is bound only to take notice of the record title of the realty, there would seem to be no reason why a record under miscellaneous documents affecting real estate is not notice to a person buying or taking a mortgage on the land, provided that such record described the land which was mortgaged.[11] However, this particular record did not mention the land (although this does not appear from the report of the case), so that it was no more constructive notice to a subsequent mortgagee than would be the record of a chattel mortgage.

The prevailing rule on this subject runs counter to the principle that one who has no title can give no better rights even to an innocent purchaser. Perhaps this is the reason for the frequent assertion in the cases that the claimant of the chattel knows that it will be affixed to the land, and placing it in the hands of

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[7] Perkins v. Lamphier (1868) 36 Cal. 151; Palmer v. Howard (1887) 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60; Vermont Marble Co. v. Brow (1895) 109 Cal. 236, 41 Pac. 1031, 50 Am. St. Rep. 37; Liver v. Mills (1909) 155 Cal. 459, 101 Pac. 299.

[8] (1912) 18 Cal. App. 642, 124 Pac. 103, 108.

[9] Supra, n. 6, at p. 134.

[10] Elliott v. Hudson, supra, n. 8; Tibbetts v. Horne (1889) 65 N. H. 242, 23 Atl. 145, 23 Am. St. Rep. 31, 15 L. R. A. 56; and see note in 49 L. R. A. (N. S.) at page 401. Contra: Sword v. Low (1887) 122 Ill. 487, 13 N. E. 826.

[11] Although there is no express provision for recording under "miscellaneous" in the Political Code, it is authorized under §§ 4131, subdiv. 14, and 4132, subdiv. 26. Such a contract is an instrument in writing by which the title to real property may be affected and would seem to come within the definition of a "conveyance" in the Civil Code. See Cal. Civ. Code, §§ 1214, 1215.

the buyer enables the latter to mislead the mortgagee.[12] This is merely a judicial crutch, because clearly a lack of knowledge on the part of the seller of the future destination of the property would not affect the result. The rights of the mortgagee do not depend upon the secret state of mind of an unknown seller. The basis of the rule is neither more nor less complicated than a disposition to discourage adverse claims to realty not apparent of record. Why not frankly recognize that it is merely a question of deciding which of two innocent parties has the claim that is socially the more desirable to protect?

The doctrine of the principal case, however, seems inordinately severe on the conditional seller. There should be some method by which he could preserve his title without contravening the spirit of the recording acts. The placing of a name-plate on the property is not adequate, because there is no assurance that it will be seen, and it is impossible to determine under what circumstances, if at all, a third person would be thus charged with constructive notice of the seller's rights.[13] But a record of the contract in such a manner as to describe the land should solve the problem.[14] A rule that would protect a conditional seller of this kind of property who thus records his contract with miscellaneous documents against a later mortgagee of the land commends itself both to business needs and legal justice. By such a rule no unreasonable burden would be placed on the mortgagee, because the universal practice of having an examination made of the title by an abstract company before the loan is advanced would involve a search of the records of miscellaneous instruments as a matter of course.

H. A. B.

MINES AND MINERALS: OIL FLOWING IN STREAMS ABANDONED PROPERTY—A owns land adjoining a watercourse. Waste oil from this land flows down the stream through the land of X and Y. A agrees with B that if the latter will construct and maintain a dam he shall be entitled to the waste oil escaping from A's property and saved by means of the dam. B, with Y's consent, constructs the works on Y's land. In *Duvall et al. v. White et al.*,[1] where B is seeking to restrain X from building a dam for the purpose of diverting the oil, the court says that after the oil is carried beyond A's premises it becomes what may be

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[12] See, besides the principal case, Thomson v. Smith (1900) 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780; and Tibbetts v. Horne, supra, n. 10.

[13] See Hobson v. Gorringe, supra, n. 5.

[14] A note in 16 Harvard Law Review, 531, suggests that the contract be recorded as a mortgage. From the standpoint of the seller, this is satisfactory, but the buyer of the fixtures would be forced thereafter to secure loans on the security of his land at the interest rate prevailing for second mortgages.

[1] (Feb. 25, 1920) 21 Cal. App. Dec. 619, 189 Pac. 324.